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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GULF STATES UTILITIES CO.,

Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

BRIEF *AMICUS CURIAE* FOR NORTH STAR STEEL TEXAS, INC. IN SUPPORT OF RESPONDENTS

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North Star Steel Texas, Inc. ("North Star") respectfully opposes the petition for writ of certiorari filed by Gulf States Utilities Company ("Gulf States"), seeking review of a final judgment of the Supreme Court of Texas. The opinion below was issued on September 12, 1990 and reported at 798 S.W.2d 560.

Statement of the Case

The decision below concludes one of two separate and distinct judicial proceedings before the courts of Texas rooted in a single decision and order of the Public Utility Commission of Texas. Since one of those judicial proceedings is not before this Court, a brief sketch of the procedural history would be appropriate.

Gulf States is an investor-owned public utility engaged in the business of providing electric service to end-users

in Texas and Louisiana. As such, its retail rates in Texas are subject to regulation by the Commission under the Texas Public Utility Regulatory Act ("PURA"), TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon Supp. 1990). In November of 1986, Gulf States applied to the Commission for authority to increase its rates for retail electric service rendered in Texas so as to recover the costs associated with its $4.5 billion investment in the River Bend nuclear generating station placed in commercial service several months earlier.[1] Extensive evidentiary hearings were conducted before three presiding officers, who filed their report about one year later, containing hundreds of factual findings and dozens of legal conclusions they recommended for adoption by the Commission. App. 109a-284a.[2] After consideration of the examiners' report, and the exceptions taken thereto by the participants, the Commission issued its final Order on May 16, 1988. App. 38a-108a.

In its final *Order*, the Commission found and concluded as follows:

> [*Findings of Fact*]:
>
> 164. The preponderance of the evidence in this case establishes that $2.273 billion of River Bend capital costs were prudently and reasonably incurred. The evidence is inadequate to support a finding of either prudence or imprudence with regard to construction costs in excess of $2.273 billion, [with one exception not here pertinent].
>
> 164A. GSU's share of all River Bend capital costs in excess of $2.273 billion should be excluded from plant in service at this time for lack of

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[1] The administrative proceeding on that application was assigned Docket No. 7195 and was consolidated with pending Docket No. 6755.

[2] The form "App. ____ a" will be utilized to cite record extracts reproduced in the separately bound appendix which accompanied the petition for writ of certiorari.

> sufficient evidence as to the prudence and reasonableness of those costs. The amount which should be included in plant in service, given GSU's 70 percent share of the plant, is $1.5911 billion.
>
> • • • •
>
> [*Conclusions of Law*]:
>
> 15. Under PURA Section 40 a utility must prove its conduct to have been prudent when decisions or expenditures are reasonably challenged.
>
> • • • •
>
> 18A. GSU has not met its burden of proving that the capital costs of River Bend above a reasonable Definitive Cost Estimate of $2.273 billion were reasonably and prudently incurred.

App. 64a & 85a-86a. On those issues, Commissioners Campbell and Greytok concurred.[3] The Commission accordingly approved rates reflecting $2.273 billion of River Bend investment in plant in service, excluding some $1.453 billion in excess of that amount. Gulf States changed its rates in compliance with Commission's action.

Gulf States and the respondent municipalities exhausted their administrative remedies by applying for rehearing before the Commission, which was denied by operation of law after forty-five days had elapsed from entry of the final *Order* without an explicit ruling on the respective motions.[4] Gulf States and other participants thereafter per-

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[3] Chairman Thomas, in dissent, would have finally disallowed nearly $460 million of River Bend investment and "inventoried" almost $500 million more. App. 41a-42a.

[4] *See* TEX. REV.CIV. STAT. ANN. art. 6252-13a § 16(e) (Vernon Supp. 1990). The petition for writ of certiorari claims at note 10 on page 7 that the two Commissioners then remaining in office "could not agree on rehearing," but offers no supporting citation to the record.

fected appeals to the 250th District Court of Travis County, Texas. Those appeals were consolidated and remain pending before that court.

Gulf States concurrently filed a new application with the Commission to change rates for retail electric service rendered in Texas so as to recover the capital costs associated with the River Bend nuclear generating station in excess of the $2.273 billion previously allowed.[5] In addition to intervening in Commission Docket No. 8702, respondents filed an independent action in the 250th District Court of Travis County, Texas, seeking declaratory and injunctive relief against relitigation of River Bend prudence issues. That court issued final judgment "permanently enjoin[ing the Commission] from holding hearings on or reconsidering the prudence of the cost to construct River Bend except to the extent such proceedings are permitted as part of a remand from the administrative appeal of Docket No. 7195." App. 30a-31a. The District Court's judgment was grounded on the following findings and conclusions:

> 4. The doctrines of res judicata and collateral estoppel apply to administrative agencies.
>
> 5. The Commission directly ruled on the prudence issues in its findings and conclusions.
>
> 6. Even if the Commission's findings and conclusions can be interpreted as lacking a direct ruling on the prudence issues, the Commission must have considered the issue to arrive at the findings and conclusions it actually made.
>
> 7. Even if the Commission's findings and conclusions can be interpreted as not requiring consideration of the issue, Gulf States had ample opportunity to have the issue considered, litigated, and decided.

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[5] The administrative proceeding on that application was assigned Docket No. 8702.

> 8. Any of the three scenarios mentioned immediately above are sufficient to invoke the doctrines' prohibition of subsequent relitigation.
>
> 9. The Commission is without authority to permit or sponsor additional litigation or consideration of the issue.

App. 29a-30a.

On appeal taken by Gulf States, the Third District Court of Appeals reversed and dissolved the trial court's injunction. The opinion of the intermediate appellate court is reported at 777 S.W.2d 814 (1989). That tribunal there analogized the Commission's action to severing a claim and proceeding separately with it, a procedure under which the severed-out claim would not be precluded in subsequent litigation. 777 S.W.2d at 817.

Respondents perfected a writ of error to the Supreme Court of Texas, which reinstated the injunction. The Supreme Court of Texas held that the failure of Gulf States to meet its burden of proof precluded further administrative proceedings to plug the evidentiary gap. *See* 798 S.W.2d at 563-64. It rejected the severance analogy invoked by the court of appeals as inconsistent with Texas practice, holding that the Commission lacked authority under PURA to defer its decision. *See id.* at 564-65. A motion for rehearing filed by Gulf States was overruled without opinion on November 28, 1990.

The Interest of *Amicus Curiae*

North Star owns and operates an electric steel-making facility near Beaumont, Texas. That plant utilizes electricity supplied by Gulf States to power arc furnaces, rolling mills,and other equipment used to convert steel scrap into useful products. As such, North Star is Gulf States' largest retail customer in Texas. North Star has intervened and actively participated in numerous Commission pro-

ceedings involving Gulf States, including Docket No. 7195 and Docket No. 8702. North Star filed briefs *amicus curiae* below, as well as briefing the issues to the court of first instance and intermediate court of appeals.

North Star accordingly has a direct interest in the rates Gulf States is authorized to charge to end-users in Texas. North Star likewise has a direct interest in assuring that participants in Commission proceedings are shielded from the expense and uncertainty incident to repetitious litigation.

Reasons for Denying the Writ

A. Gulf States Failed To Properly Raise And Preserve Its Federal Claims Below

Gulf States failed to properly raise and preserve its federal claims below, rendering discretionary review here inappropriate. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.' " *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 550 (1987) (citation omitted). Indeed, Supreme Court Rule 14.1(h) unambiguously requires Gulf States to specify where and how any federal question for which review is sought was asserted in the state court proceedings with sufficient particularity "as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." Gulf States has fallen short on that score.

The opinion and final judgment of the Supreme Court of Texas embody no adjudication of Constitutional claims, as the petition for writ of certiorari concedes at page 9. This should have come as no surprise to Gulf States, because it had presented no such claims to that tribunal. At page 9 of its petition, Gulf States notes that it filed briefs

in the courts below wherein it "expressly relied on a decision of this Court, *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), for the proposition that preclusion could not apply." One searches those briefs in vain for bare mention of the Constitution or other suggestion of a federal claim. *Utah Construction* was instead cited as illustrative of common-law jurisprudence. Indeed, in its brief to the court of first instance and to the Supreme Court of Texas, Gulf States included *Utah Construction* as the first citation in a string, the others being state appellate decisions. App. 303a & 307a. Nothing there presented reasonably alerted the courts of Texas that Gulf States was seeking a ruling on any Constitutional issue, much less the specific questions which are now presented in its petition for writ of certiorari. Such "casual references" to federal precedent wholly fail to apprise a state court that Constitutional claims are being presented. *Rotary International, supra* at 550 n. 9.

Gulf States closes its statement of the case by insisting that its motion for rehearing below had "reiterated that federal issues were present and had been left unaddressed by the Court's opinion." Petition at 11. However, Gulf States could not have there "reiterated" what it had failed to iterate before. The extracts from its motion for rehearing below included in its appendix diverge markedly from its earlier presentation.[6] Indeed, *Utah Construction* goes entirely unmentioned in those extracts. Moreover, the one line minute entry overruling that motion fails to es-

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[6] Those extracts foreshadow the arguments addressed under Gulf States' last reason asserted for granting the writ, presented at pages 21-23 of the petition. Gulf States offers no explanation for its failure to earlier bring those issues to the attention of the Supreme Court of Texas, much less its silence on that score in the court of first instance and the intermediate appellate court. Issues first raised in the course of seeking rehearing come too late under Texas law. *See Morrison v. Chan*, 699 S.W.2d 205, 206-07 (Tex. 1985); *Watson v. Glen Falls Insurance Co.*, 505 S.W.2d 793, 797-98 (Tex. 1974).

tablish that the Supreme Court of Texas actually decided these newly presented questions on the merits. *See Rotary International, supra* at 550. Under the circumstances, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *See id.*

The questions which Gulf States presents in its petition for writ of certiorari were not raised and decided below. The writ should accordingly be denied for want of a properly preserved federal claim.

B. The Claim that the Commission Denied Gulf States Due Process is Premature

Even where federal claims have been properly preserved, this Court's jurisdiction to review state court proceedings is not untrammeled. Insofar as here pertinent, certiorari jurisdiction extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a) (1988). The arguments grouped under Point II of the reasons given by Gulf States for granting the writ are not ripe for review in this Court, because they may be raised in the direct appeals taken from the Commission's Order in Docket No. 7195. Those issues have yet to be finally decided in the first instance, much less by the highest appellate tribunal in which a decision could be had.

Gulf States admonishes that administrative decision makers may be "less concerned with procedural regularity than are the courts." Petition at 14. Gulf States goes on to argue that the agency did not subjectively intend the consequences of its findings and that it improperly altered the standards of proof after the record had closed. We will show, under heading C *post*, that these contentions are insubstantial. However, even if we indulge the fiction that the Commission erred in the manner Gulf States contends and assume that the error has been preserved under

State procedures, the claimed defects are appropriately raised as grounds for reversal on direct judicial review of the final *Order* entered by the Commission in Docket No. 7195. Gulf States has already commenced such proceedings in Travis County District Court. They are not, however, implicated by the final judgment entered in the independent civil action from which the petition for writ of certiorari has been taken. That judgment forecloses Gulf States from collaterally attacking the Commission's Docket No. 7195 decision in a subsequent rate case.

The final judgment of the Supreme Court of Texas neither adds to nor subtracts from the issues remaining unresolved on direct judicial review. The writ should accordingly be denied for want of a final determination of the claim in State court.

C. The Petition Presents No Substantial And Important Federal Question

Putting the jurisdictional impediments to discretionary review discussed above under headings A and B to one side, no substantial and important federal questions are presented by the petition. The arguments presented by Gulf States boil down to the following logic:

(1) The fourteenth amendment strips a state administrative order of preclusive effect unless the precluded issue was actually decided by the agency.

(2) The Commission did not actually decide whether some $1.4 billion of River Bend capital costs had been prudently incurred.

On that two-part syllogism and for a variety of reasons ostensibly cloaked in due process garb, Gulf States insists that it must be afforded another opportunity to litigate the excess costs. The petition for writ of certiorari asks this court to establish the first premise and argues that the second premise has been satisfied. We will address

these propositions in reverse order, since resolution of the due process question becomes purely advisory upon examination of the Commission's decision under Texas law.

The petition for writ of certiorari announces no less than a dozen times that the Commission did not decide the prudence of the investment in River Bend, making much of what the Commission subjectively thought it could do procedurally. We have no quarrel with the proposition that two Commissioners actually, *albeit* erroneously, believed that Texas law empowered them to afford Gulf States the chance to relitigate the excess River Bend capital costs in a subsequent rate case. Fatal to the argument presented by Gulf States, however, are the Commission's specific findings that "[t]he evidence is inadequate to support a finding of either prudence or imprudence with regard to construction costs in excess of $2.273 billion" (Finding 164) and that "all River Bend capital costs in excess of $2.273 billion should be excluded from plant in service at this time for lack of sufficient evidence as to the prudence and reasonableness of those costs" (Finding 164A). App. 64a. The legal effect of those findings under state law, as authoritatively construed by the Supreme Court of Texas, is that the Commission actually decided the prudence question on the merits.

> In this rate case, the PUC declared that GSU failed to meet its burden of proof to show that the entire $4.5 billion expense was prudently incurred. Because of a "lack of sufficient evidence", the PUC in its finding 164A, excluded from plant in service all "capital costs in excess of $2.273 billion." A party who fails to meet its burden of proof loses. The party who has the burden but fails to persuade the trier of fact is not entitled to a second trial to present more evidence. By stating that GSU failed to meet its burden of proof on the prudence of the $1.453

> billion, the PUC effectively disallowed that amount from the rate base.

798 S.W.2d at 563-64.[7]

In reaching for a question of Constitutional dimension, the petition for writ of certiorari distorts *Utah Construction* beyond recognition. The "decision [t]here rest[ed] upon the agreement of the parties as modified by the Wunderlich Act," but this Court noted that the result reached was "harmonious with general principles of collateral estoppel." *See* 384 U.S. at 421 (footnote omitted).[8] The *dictum* which followed likewise bespoke common-law, not Constitutional law, doctrine:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Id. at 422. *Utah Construction* thus purported to delineate no due process boundaries.

It has been settled for more than a century that *res judicata* ("claim preclusion") forecloses relitigation of all that might have been litigated previously, whether or not

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[7] The Commission accordingly had no power under State law to reserve the excess cost issue for later decision, as the Supreme Court of Texas explicitly held. *See id.* In effect, the petition for writ of certiorari asserts that due process conferred a vested right upon Gulf States to the fruits of the Commission's error of Texas law. No authority has been or can be cited for that proposition.

[8] The cited case was a Government contracts appeal, the quoted passage suggesting no Constitutional holding, and the petition for writ of certiorari is bereft of citation to caselaw reading more into *Utah Construction* than symmetry with general common-law principles. Indeed, *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) confirms that this Court was "fashioning federal common-law rules of preclusion."

actually litigated. *See Brown v. Felsen*, 442 U.S. 127, 139 n. 10 (1979); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). Gulf States suggests no Constitutional impediment to this long-standing doctrine. Although the petition for writ of certiorari treats the decision below as grounded on collateral estoppel ("issue preclusion"),[9] we are left to speculate as to why the application of the fourteenth amendment should turn on fine points of the common-law of judgments. No requirement of "actual resolution" may arguably be crafted as an essential component of due process.

Gulf States bemoans the supposedly "startling . . . harshness" of the decision below, claiming that the Commission held Gulf States to "new and detailed proof requirements" announced after the evidentiary record had closed. Petition at 17. The petition for writ of certiorari falls curiously silent in particularizing just where that happened and the administrative record will not support that extravagant claim.

In the first place, the Commission engaged in garden variety fact-finding, weighing the evidence adduced over the course of more than one-hundred hearing days. The Commission held the statistical evidence put on by Gulf States wanting in credibility, while upholding the findings of its presiding officers that Gulf States had not otherwise carried its burden of proof by reconciling its costs with legitimate reasons.[10] Contrary to the implications of the

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[9] The decision below supports its holdings in reference to "*res judicata*" standing alone or to "*res judicata* and collateral estoppel" entwined together. Nonetheless, we may accept the characterization employed by Gulf States for purposes of analysis.

[10] The Commission apparently viewed the adjusted definitive cost estimate figure of $2.273 billion as a representative of a reasonable estimate of the investment required to build River Bend. Findings of Fact 64-68 & 79-93; App. 55a-58a. It accordingly accepted costs up to that figure as having been proved prudently incurred, but concluded

petition for writ of certiorari, no regulatory body is bound by due process to provide a running critique to the persons it regulates—guiding their counsel through the evidence and confiding what will be required to make a convincing showing. The Commission's final *Order* held Gulf States to nothing more stringent than a preponderance of the evidence standard and did nothing to render admissible any evidence which Gulf States had unsuccessfully tried to adduce.[11]

The Commission had not previously announced that *any* statistical proof, regardless of its flaws, would invariably suffice. Nor, did the Commission categorically hold in Docket No. 7195 that statistics could *never* carry a utility's burden of proof. Instead, the ruling was unambiguously case-specific—"The statistical analyses *presented in this docket* were inadequate to prove the reasonableness or prudence of River Bend construction costs." App. 63a (Finding 163, emphasis added).[12] Reliance on evidence of that character carried with it litigation risks of which Gulf States should have been aware.[13]

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that Gulf States had failed in its burden of proof as to the excess. Conclusion of Law 18; App. 86a. Respondents have challenged that rationale in the direct appeals pending in Travis County District Court.

[11] The cases cited at page 18 of the petition for writ of certiorari are accordingly inapposite.

[12] The *Examiners' Report* was no ringing endorsement: "[a]lthough statistical analysis is an imprecise measure, it is the best one offered in this proceeding." App. 260a (Proposed Finding 163). In their discussion, the presiding officers damned the statistical evidence adduced by Gulf States with faint praise, remarking that this regression analysis was "the only means available, in this case," to compare River Bend to its peers and that it was the "most credible" and based on the "most reasonable set of variables." App. 181a-82a. The Commission simply ruled that Gulf States' "best" was not good enough.

[13] Commissioner Greytok was not writing on a clean slate when she spoke of the regression analysis model adduced by Gulf States in the following terms: "there are lies, damned lies, in [*sic* and] statistics and that one probably falls, in my view, very firmly into the latter cate-

In the second place, Gulf States gambled and lost with a tactical decision to rest its case before the Commission on the evidentiary record then accumulated.[14] Bluntly put, Gulf States set out to prove, was afforded fair opportunity to prove, but failed to prove by a preponderance of the evidence that the River Bend cost over-runs had been prudently and reasonably incurred. In their report to the Commission, the three presiding officers clearly reminded Gulf States of its burden of persuasion:

> . . . . It is up to GSU, not the intervenors, to justify these costs either by a detailed reconciliation of cost increases with legitimate reasons or by reliable statistical analysis. GSU must explain why River Bend is the fifth most expensive plant, per kW, in the United States.
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> Dr. Weigand of GSU observed . . . that "GSU doesn't know why River Bend cost so much." That appears to be the case. GSU did not present any credible reconciliation of plant costs with specific causes, much less with specific regulatory

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gory." App. 288a. Commissioner Campbell likewise rejected the regression analysis offered, for reasons Gulf States "itself argued, it is too subjective. . . . too subject to playing with figures and manipulation." App. 290a. The proof offered simply was not credible to the Commission majority. Indeed, the *Examiners' Report* observed that Gulf States itself had echoed staff arguments "that regression analysis is inherently subjective and its accuracy suspect," having presented such evidence "[a]lmost against its will." App. 181a.

[14] Gulf States was apparently then well satisfied with the evidentiary record:

> The record in this proceeding is enormous. In 132 hearing days, over one hundred witnesses appeared. Their prepared testimony covers a thousand pages and their cross-examination many, many thousands more. Thousands more pages of exhibits were received in evidence. Every factual, legal, and policy issue was thoroughly explored and canvassed.

Gulf States *Reply to Exceptions to Examiners' Report* at I-1.

> changes. Even if the causes for change were legitimate, it did not show that the amounts of money spent to meet various goals were reasonable. It did show more generally that regulatory changes had a dramatic effect on the project's scope and cost. Yet from the evidence one cannot tell how wisely and efficiently money was spent on design development, scope changes, and meeting regulatory changes.
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> • • • •
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> . . . . GSU has the burden of justifying the costs of River Bend either by detailed analysis or by showing that these costs are reasonable compared with those of other plants. It failed to do the first. . . . .

App. 181a (record citation and footnote omitted) & 192a.[15]

Gulf States was told early on that its failure to explain why River Bend ran so far over budget placed its case in substantial jeopardy. At the January 18, 1988 public meeting, Commissioner Greytok undertook a discussion of the over-run with Gulf States' counsel:

> COMMISSIONER GREYTOK: Mr. Avery, there are sections of the Examiners' Report that state clearly that they cannot give us any indication whatsoever as to what happened with the escalating cost of River Bend. And when we started out the other day, I made the comment to you right up front, so there would be no doubt in

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[15] The presiding officers recommended adoption of explicit findings that Gulf States "could have developed a far more complete and accurate investigation" into River Bend's cost over-runs and that the non-statistical explanations for the plant's high costs "were inadequate and unconvincing." App. 257a (recommended findings 131 & 132). The Commission's final *Order* adopted these recommendations verbatim. *See* App. 62a.

> your mind as to where I was headed, that we are missing $2.3 billion as far as being able to account for it.
>
> MR. AVERY: Unreconciled; right.
>
> COMMISSIONER GREYTOK: Unreconciled, undocumented, un-whatever; it's not there.
>
> MR. AVERY: But not found to be imprudent.
>
> COMMISSIONER GREYTOK: Well. it depends on whose finding—you know, the way—
>
> COMMISSIONER CAMPBELL: I don't have to find it imprudent. If you haven't proved it to be prudent and to have been incurred through efficient operation, Mr. Avery, it would seem to me that all I would have to do is convince one other Commissioner to adopt the statement of our expert that there is no evidence in the record in which the Commission can either make a finding of prudence or imprudence and all. As long as I adopt that statement, *you have lost on the burden of proof.*

Final Order Meeting Tr. 780-81 (emphasis added). Commissioner Campbell reiterated and re-emhasized the consequences of Gulf State's failure of proof. *Id.* at 791-92 & 832.

Notwithstanding those admonitions, Gulf States unequivocally disclaimed any need to reopen the record.

> MR. AVERY: What I'm saying to you is, you say we don't want a remand.
>
> What I'm saying to you is, I'm not going to tell you anything but straight what we think. What we think is, a remand isn't necessary because *we met our burden of proof.* And I can't tell you that I don't think that if I do think that.

• • • •

> But, what I've also said to you—and I think this is crucially important and what I don't think I've gotten across to you is—I'm also saying to you, *if you think there should be a remand*, we are more than prepared to go about providing that remand . . . .

Id. at 834 (emphasis added).[16] That Gulf States later experienced a change of heart after entry of the Commission's final *Order* is readily understandable.[17] Yet, due process is not a license to hold back your proof until you learn that you have lost.

As its final parry to the decision rendered below, Gulf States accuses the Supreme Court of Texas of "undermin[ing] the basic foundation of constitutional ratemak-

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[16] Counsel had earlier disclaimed asking for an opportunity to adduce further proof on remand:

> MR. AVERY: I'm sorry, Commissioner; I don't think I have asked you to do that. I have said if you want a remand, that's open to you.

Id. at 790. Counsel thereby reaffirmed his optimistic assessment of the record—"We do not think that an order which disallowed everything over the definitive cost estimate has a shred of a chance of being sustained on appeal." *See id.* at 780.

[17] Even at the late stage, Gulf States did not request the Commission to defer ruling on recovery of any River Bend investment until the evidentiary record could be reopened and supplemented. Gulf States instead argued for a procedure whereby only the $1.453 billion excess capital costs were to be reconciled, with the $2.273 billion consistent with the definitive cost estimate "sever[ed]" and recovered from its customers as part of a final decision in Docket No. 7195. *See Gulf States' Motion for Rehearing of the Commission's Order of May 16, 1988* at p. II-36. Gulf States thereby sought to take the "sweet" and reject the "bitter" aspect of the Commission's decision. Texas law does not permit a unitary asset to be so casually split into separately litigated pieces, as the decision below squarely holds. *See* 798 S.W.2d at 564-65.

ing"—which Gulf States equates with "a just and reasonable end-result, which must balance ratepayer and investor interests." Petition at 21. Such arguments founder on the immutable reality so assiduously denied throughout the petition for writ of certiorari: the Commission's determination that Gulf States failed to carry its burden of proof resolved prudence issues on the merits as a matter of State law. Burden of proof was assigned by the Texas legislature in categorical terms:

> In any proceeding involving any proposed change of rates, the burden of proof to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable *shall be on the public utility.*

TEX. REV. CIV. STAT. ANN. art. 1446c § 40 (Vernon Supp. 1990) (emphasis added). That burden is not to be relaxed, under the guise of "balancing," merely because the regulated utility fails to meet it.

Gulf States portrays the Commission's willingness to hold the excess River Bend costs "in abeyance" as "an essential part of the Commission's attempt to balance consumer and investor interests." Petition at 21. Gulf States seemingly there suggests that evidence which Commissioners Greytok and Campbell refused to credit would have been transmuted into proof they believed, just because the interests of Gulf States investors would have been thereby advanced. That speculation has no foundation in the record. Indeed, they admonished Gulf States on the record that they intended to uphold their sworn duty:

> COMMISSIONER GREYTOK: . . . . I am not about to say to the ratepayers in your service area that I'm going to give you $2.3 billion based on nothing. In this Examiners' Report, we have witnesses who clearly state that you cannot—that there is no documentation.

Final Order Tr. 787.

> COMMISSIONER CAMPBELL: Mr. Avery, you know, I said when I came on this Commission I was going to be fair to every utility, and I said if you make your case, you would get it and if you didn't make your case, you didn't get it, and that the company shouldn't look at me or any other member of this Commission, they had better look at the attorneys and witnesses that put on their case.
>
> Now, as far as I'm concerned, there are some very critical issues that haven't been proven up in this case. And I feel that under the law—and I'm a stickler on trying to apply the law—under the law, I have absolutely no right to give you anything you haven't proven by a preponderance of the evidence. . . .

Id. at 790.[18]

Compounding its misreading of the Commission majority, Gulf States pretends that the Texas legislature authorized such "balancing" in the agency's fact finding process. This Court must firmly turn aside Gulf States' cynical suggestion that the Commissioners would have voted differently had they only known that Gulf States' failure of proof could not be cured later on.

Quite apart from the jurisdictional impediments to discretionary review discussed above under headings A and B, the petition for writ of certiorari seeks nothing more than another round of judicial review of the sufficiency of the evidence presented to a state administrative agency.

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[18] Counsel for Gulf States responded to Commissioner Campbell by reiterating that, under the company's view of the law, "we think we've satisfied our burden of proof. Now, you're the Commissioner; you have to decide." *Id.* at 791.

The questions presented are unworthy of consideration on the merits by this Court.

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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